

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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HEATHER L. CROW,  
Plaintiff,

v.

HOME LOAN CENTER, INC.; et al.,  
Defendants.

3:11-cv-0259-LRH-VPC

ORDER

Before the court is defendant T.D. Service Company's ("TD") motion to dismiss (Doc. #12<sup>1</sup>) to which defendants Mortgage Electronic Registration System, Inc. ("MERS") and Federal National Mortgage Association ("Fannie Mae") joined (Doc. #13). Plaintiff Heather Crow ("Crow") filed an opposition. Doc. #16.

Also before the court is TD's motion to strike Crow's opposition. Doc. #18.

**I. Facts and Procedural History**

In January, 2007, Crow refinanced real property through a mortgage note and deed of trust originated by defendant Home Loan Center, Inc. Eventually, Crow defaulted on the mortgage note and defendants initiated non-judicial foreclosure proceedings.

Subsequently, Crow filed a complaint against defendants alleging nine causes of action:

<sup>1</sup> Refers to the court's docket number.

(1) debt collection violations; (2) Nevada Unfair and Deceptive Trade Practices Act, NRS 598.0923; (3) Nevada Unfair Lending Practices Act, NRS 598D.100; (4) breach of the covenant of good faith and fair dealing; (5) NRS 107.080; (6) quiet title; (7) fraud; (8) slander of title; and (9) abuse of process. Doc. #1, Exhibit B. Thereafter, TD filed the present motion to dismiss to which MERS and Fannie Mae joined.<sup>2</sup> Doc. ##12, 13.

## II. Legal Standard

Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference, based on the court’s judicial experience and common sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to

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<sup>2</sup> Neither TD, MERS, or Fannie Mae are named defendants as to Crow’s eight cause of action for slander of title or ninth cause of action for abuse of process. As such, this order only address the remaining seven causes of action.

1 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

2 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
3 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
4 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
5 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
6 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
7 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
8 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
9 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
10 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 11 **III. Discussion**

#### 12 **A. Debt Collection Violations**

13 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal  
14 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,  
15 Crow alleges that defendants violated the FDCPA by initiating a non-judicial foreclosure without  
16 following the proper procedures for attempting to collect a debt. But, it is undisputed that  
17 defendants TD, MERS, and Fannie Mae took no action in initiating the non-judicial foreclosure in  
18 this action.

19 Additionally, it is well established that non-judicial foreclosures are not an attempt to  
20 collect a debt under the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse*  
21 *v. Ocwen Fed. Bank FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist.  
22 LEXIS 65798 (D. Nev. 2010) (holding that recording a notice of default is not an attempt to collect  
23 a debt because the borrower already consented to allow the foreclosure trustee to record the notice  
24 upon default). Therefore, the court finds that Crow fails to state a claim against moving defendants  
25 for violation of the FDCPA, and thereby NRS § 649.

1           **B. Nevada’s Unfair and Deceptive Trade Practices Act**

2           Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of  
3 Nevada without all required state, county or city licenses. NRS 598.0923(1). Crow alleges,  
4 generally, that defendants violated the statute by recording the underlying notice of default without  
5 having a state business license. However, none of moving defendants recorded the notice of  
6 default. Therefore, the court finds that Crow has failed to state a claim upon which relief can be  
7 granted.

8           **C. Nevada Unfair Lending Practices Act**

9           NRS 598D.100 prohibits lenders from making loans “without determining, using  
10 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home  
11 loan.” NRS 598D.100(1)(b). However, this suitability language was added in mid-2007 when the  
12 statute was amended. Although Crow alleges that defendants violated the present version of the  
13 statute, her refinance loan originated January 2007, prior to the current amendment. Therefore,  
14 Crow’s loan cannot have violated the current statutory language requiring a determination that a  
15 borrower has the ability to repay the loan.

16           Additionally, Crow’s unfair lending practices claim is barred by the applicable statute of  
17 limitations. The statute of limitations on an unfair lending practices claim under NRS 598D is two  
18 (2) years. *See* NRS § 11.190(3)(a). Crow refinanced her property in January 2007, and did not file  
19 the present action until 2011, over two years after the statute of limitations had expired.  
20 Accordingly, the court shall grant moving defendants’ motion as to this issue.

21           **D. Breach of Good Faith and Fair Dealing**

22           Under Nevada law, “[e]very contract imposes upon each party a duty of good faith  
23 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784  
24 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for  
25 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the  
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1 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and  
2 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
3 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.  
4 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*  
5 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

6 Here, Crow alleges that defendants breached the implied covenant because they  
7 misrepresented the cost of credit involved in the loan agreement. However, these alleged  
8 misrepresentations occurred *before* a contract was formed. *See* Doc. #1, Exhibit B. Crow fails to  
9 allege any facts to establish a breach of the implied covenants *after* the contract between the parties  
10 was formed. Further, neither TD, MERS, nor Fannie Mae were involved in the origination of  
11 Crow's loan. Accordingly, the court finds that Crow fails to state a claim against moving  
12 defendants.

#### 13 **E. NRS 107.080**

14 Crow alleges that defendants violated NRS 107.080 by not complying with the applicable  
15 provisions in NRS 107.086 and 107.087 concerning recordation and mailing of the notice of  
16 default. However, there are no specific allegations that moving defendants took part in any of the  
17 foreclosure proceedings. Further, it is undisputed that moving defendants did not record the  
18 underlying notice of default. Therefore, the court finds that Crow fails to state a claim against  
19 moving defendants for violation of the state recording statute.

#### 20 **F. Quiet Title**

21 Under Nevada law, a quiet title action may be brought by someone who claims an adverse  
22 interest in property. NRS § 40.010. Here, moving defendants do not claim any interest in the  
23 property adverse to Crow's interest. Therefore, Crow has no grounds to quiet title against moving  
24 defendants.

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1           **G. Fraud**

2           “In alleging fraud or mistake, a party must state with particularity the circumstances  
3 constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading  
4 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well  
5 as the names of the parties involved. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.  
6 2009); *see also*, *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th Cir. 1999); *Parnes v.*  
7 *Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a plaintiff to allege the requisite  
8 who, what, where, when, and how of the misrepresentation).

9           Here, Crow fails to allege any specific allegations of who failed to provide information or  
10 what information was not provided. As such, Crow fails to specifically allege the requisite “time,  
11 place, and specific content of the false representation as well as the identities of the parties to the  
12 misrepresentations.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). Therefore,  
13 the court finds that Crow’s allegations are insufficient to support her claim for fraud. Accordingly,  
14 the court shall grant moving defendants’ motion to dismiss.<sup>3</sup>

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24           <sup>3</sup> The court, in granting defendants’ motion to dismiss, notes that Crow did not request leave to amend  
25 her complaint. However, even if Crow did request leave to amend the court would deny her request because  
26 she has failed to make any showing that amendment in this particular case would not be futile or that she could  
overcome the identified pleading defects.

1 IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #12) to which  
2 additional defendants joined (Doc. #13) is GRANTED. Moving defendant T.D. Service Company,  
3 and joining defendants Mortgage Electronic Registration Systems, Inc. and Federal National  
4 Mortgage Association are DISMISSED as defendants in this action.

5 IT IS FURTHER ORDERED that defendant's motion to strike plaintiff's opposition to the  
6 motion to dismiss (Doc. #18) is DENIED as moot.

7 IT IS SO ORDERED.

8 DATED this 15th day of August, 2011.



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11 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE